IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. ERNEST CARL CRANK, Defendant.	NO. 98-175 ORDER

Earnest Carl Crank brings this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. Crank was found guilty by a jury of six counts of conspiracy to distribute and distribution of cocaine and cocaine base. His initial sentence was partially vacated and remanded by the Court of Appeals for the Eighth Circuit based on Apprendi v. New Jersey, 530 U.S. 466 (2000). The district court resentenced Crank to 240 months on each count to be served concurrently. This sentence was affirmed by the Court of Appeals affirmed the sentence.
United States v. Crank, No. 01-1775 (8th Cir. October 25, 2001)(unpublished)(per curiam).

Defendant now brings this motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In his motion he states tat his conviction should be overturned for a number of reasons. The government resists the motion. Through counsel, Crank filed a reply to the government's original response but did not amend his complaint. Crank also filed a pro se reply to the government's response which counsel incorporates into his brief.

A prisoner is entitled to an evidentiary hearing on section 2255 motion unless the motion, files and records of the case conclusively show that the prisoner is not entitled to relief. 28 U.S.C. § 2255; Voytik v. United States, 778 F.2d 1306, 1308 (8th Cir.1985). "Accordingly, a petition can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." Engelen v. U.S., 68 F.3d 238, 240 (8th Cir.1995). The court denies the motion without a hearing for the reasons that follow.

Pro Se Section 2255 Motion

Crank's pro se motion makes five general claims of (1) ineffective assistance of pretrial, trial, sentencing and appeal counsel; (2) insufficient evidence of drug amounts; (3) improper jury instructions; (4) improper amendment of the indictment, and (5) lack of subject matter jurisdiction.

Crank asserts his counsel was ineffective because there was no preparation or discussion or trial strategy with Crank, no information of any plea discussions, he failed to raise what Crank thought were relevant issues, failed to file certain pretrial motions, failed to request forensic analysis, failed to object to drug evidence and lab reports, failed to discuss any possible stipulations concerning drug evidence; failed to follow through on motion for mistrial based on the cross examination of Charles Ledoux, failed to object to the amendment of the indictment, failed to discuss presentence report, failed to properly represent defendant during appeal by not consulting with defendants, not consulted on the resentencing appeal, second appeal was submitted late, failed to argue for a sentence on cocaine rather than cocaine base, and failed to require all rulings of court be made on the record.

Other than listing these issues, Crank does not give any other support for his claims. Assertions of ineffective assistance which are stated in a conclusory fashion are not sufficient to state a viable claim, and such claims may be dismissed without a hearing. Delgado v. United States. 162F.3d 981,983 (8th Cir. 1998)(where there is "no showing of what other witnesses were available, how they would have testified, and why such additional evidence would likely have affected the result, he has failed to prove either that counsel's assistance was ineffective or prejudice."); see also Saunders v. United States, 236F.3d 950, 952-953 (8th Cir. 2001) (petition failed to identify other witnesses and what testimony might be and thus, impossible to determine impact on trial or defense). Crank has failed to set forth specifically what counsel should have done differently or how any alleged errors changed the outcome of the proceeding. He failed to allege how counsel erred in arguing sentencing or how further meetings with this attorney would have affected the outcome of his trial. He does not identify what issues he wanted counsel to raise at trial or on appeal, and does not state how further tests or expert analysis could have been used to his benefit. Crank does not state what

plea offer was ever made to him or whether he would have accepted such an offer. In essence, the allegations and claims under ineffective assistance of counsel are far too vague and broad to state a claim.

The same is true for defendant's other claims. He fails to state why the testimony of Trisha Miller did not have a significant indicia of reliability to meet the required standard of proof, or why he believes it was error for the government erred not to submit a special verdict form to the jury. Crank states no basis for his claim that the indictment was improperly amended or that the court lacked jurisdiction over his claim. Without more information and description, these claims as stated are all too broad and sweeping to state a cognizable claim. See Saunders 236 F.3d at 953 (citing Cooper v. Schriro, 189 F. 3d 781, 785 (8th Cir. 1999)(petition "lacks Sufficient specificity under even the most liberal pleading requirements.")). Thus any claims raised by defendant, pro se, are dismissed unless they are further supported either by counsel or in a pro se supplemental brief. The court only discusses below those claims which are further briefed by either counsel or plaintiff, pro se.

Defendant's Reply to Government Response

Although counsel for defendant states that he does not waive any of the issues raised by defendant's pro se pleadings, he only addresses and briefs the issues of ineffective assistance of counsel with respect to false and misleading evidence, unreliable evidence, ineffective appellate and resentencing counsel, and ineffectiveness in the totality of the circumstances.

A. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, defendant must show (1) counsel's representation was deficient, and (2) the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984). To establish the first prong, it must be shown that counsel's performance fell below an objective standard of reasonableness. Id at 694. The court need not address both components of the test if defendant makes an insufficient showing on one of the prongs. Id at 697.

1. False and Misleading Evidence Due to Ineffective Assistance of Counsel

Defendant asserts that trial counsel should have obtained an expert to object to the five laboratory reports introduced as

evidence at his trial. The laboratory reports showed that the relevant substances were cocaine base (crack), cocaine base, and salt of cocaine, with respect to each example. Defendant argues that trial counsel should have sought the appointment of an expert to examine and test the substances and to advise counsel on appropriate cross-examination questions of the laboratory experts.

Defendant asserts that these facts are similar to those in United States v. Monroe, 978 F.2d 433 (8th Cir.1992), where the only issue for the court to determine was whether the substance was crack cocaine or cocaine powder. In Monroe, the testimony of the government's laboratory expert was in and of itself inconsistent. Id. at 435. Because the government's own witness testified that the sample could be one of several substances, the Court of Appeals vacated Monroe's sentence and remanded the case to the district court for resentencing. Id.

Defendant argues that the laboratory reports in this case were inconsistent. However, here there were five substances examined, independently tested and weighted. Each of them came back with different weights and findings. In Monroe, there was on laboratory sample and the expert had described the sample as both

crack and as powder cocaine. Here, the laboratory results have a different result for each sample but there is no inconsistency within any single sample. Thus, this case is not like Monroe where there was inconsistent testimony by the same witness regarding one substance sample. There was no basis upon which to challenge the description of each substance, and therefore, it was not deficient for trial counsel to fail to obtain an expert witness.

Even if defendant could show that counse4l should have secured an expert, he has failed to show how such expert would have prejudiced him, that is, how it would have changed the outcome of the trial. There is no showing or assertion that an expert would have had different results than the laboratory results of the government witness. Without more, defendant's argument in his brief fails to show that hiring an expert would have necessarily undermined the credibility of the government's witness. No prejudice has been shown on this issue, and therefore, no valid ineffective assistance of counsel claim.

2. Failure to Properly Prepare for Cross Examination of Government's Witness

Prior to defendant's trial, a detention hearing was held. According to trial counsel's notes from that proceeding, Hope Overton testified that she only purchased powder cocaine from defendant. Defense counsel was also aware from the report of Agent Greg Brugman that Trish Miller intended to buy crack from defendant but returned with powder cocaine. Defendant further asserts that the grand jury testimony of Hope Overton reflects that she only purchased powder cocaine from defendant. Because all pretrial testimony referred to powder cocaine, Crank argues that the trial counsel should have impeached the trial witnesses when they inferred that they also purchased crack cocaine from defendant.

It is unclear why counsel did not try to impeach the witness on this point. It may have been a failure to study the record or a tactical reason. Regardless of the reason, however, Crank cannot show that such a deficiency was prejudicial to him to satisfy Strickland. During the direct examination of Overton, both she and the prosecutor referred to the substances as either

"transactions" or "drugs." Even if counsel should have cross-examined Overton and Miller as to the type of substance they purchased from Crank, defendant can not show prejudice as defined by Strickland. In addition to the testimony of Overton and Miller, the government called law enforcement officials to corroborate their testimony and there were laboratory reports and samples themselves to show that Crank sold both crack and powder cocaine. Thus, even if counsel had attacked the credibility of Overton and Miller on this basis, it would have been insufficient to show a reasonable probability that the proceeding would have been different. As such, there is no claim for ineffective assistance of counsel.

B. Ineffective Sentencing Counsel

1. Unreliable Evidence

Crank argues that because trial counsel was ineffective for failing to contest the laboratory reports or challenge the witness statements with respect to the type of substance, the sentencing court did not have adequate information upon which to base a determination of quality of drugs.

For the reasons given above, trial counsel was not ineffective for failing to do these things, and similarly, neither was sentencing counsel. There was sufficient reliable evidence in the record as to the amount and types of drugs. Even if defendant had challenged the evidence, there was enough other evidence to establish the quantity and type of drug involved. Again, without prejudice, there is no underlying claim for ineffective assistance of counsel.

2. Obstruction of Justice

Defendant was given a two level adjustment in penalty for obstruction of justice under U.S.S.G. §3C1.1. "[I]f a defendant objects to a sentence enhancement resulting from [his] trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same, under the perjury definition we have setout." United States v. Dunnigan, 507 U.S. 87, 95 (1993).

Defense counsel did not object to the presentence report or object at the time of sentencing. Even if counsel should have made the objection, the result of the proceeding would not have

been different. The sentencing court believed the testimony of some witnesses to be exaggerated but accepted and found a sufficient basis for the jury's conclusion that the defendant had been involved in illegal drug transactions. See Sentencing Transcript at 18. Defendant denied involvement in the drug transactions. With such contrasting positions, if there had been an objection, the court would have made the requisite finding of perjury by defendant. Thus, defendant was not prejudiced when his counsel did not object to the obstruction of justice enhancement.

C. Ineffective Appellate Counsel and Re-Sentencing Counsel

Defendant wanted a new determination of drug quantity either through trial or resentencing. Essentially, he believed that if Apprendi applied to his case, that is, a jury determination of the drug amount made beyond a reasonable doubt, he would at least receive a different sentence and even possibly be acquitted. Crank asserts he was unable to make his request known to his appellate counsel or re-sentencing counsel because counsel changed addresses and did not keep defendant informed of this change. Counsel for Crank asserts that where there is ambiguity as to

which drugs were actually distributed, the defendant is entitled to a special verdict. Counsel also discounts the government's reliance on Edwards v. United States, 523 U.S. 511 (1998)(district court should determine type and amount of drugs involved when determining the applicable sentencing range under the guidelines so long as sentence imposed does not exceed that applicable to the offense found by the jury) as it was decided pre-Aprendi.

This argument also fails. The Court of Appeals has relied on Edwards even in post-Apprendi cases. See e.g. United States v. Miller, 295 F.3d 824, 827 (8th Cir. 2002); United States v. Gallardo-Marquez, 253 F.3d 1121, 1124 (8th Cir. 2001). Further, as discussed previously, there is no ambiguity as to the drugs that were involved in this case. Through the laboratory reports and witness testimony, it was clear that Crank distributed both crack and powder cocaine. The Court of Appeals found there as sufficient evidence of this in the first appear, and based on this finding and the new sentence imposed, also held that the new sentence was valid under Apprendi. See United States v. Crank, No. 01-1775 (8th Cir. October 25, 2001). Thus, even if counsel, at resentencing, had requested that the jury make findings on this

issue, the motion would have been denied. As there is no prejudice to defendant, there is no valid claim here for ineffective assistance of counsel.

D. Cumulative Errors Create Ineffective Assistance of Counsel

Defendant argues that cumulative errors justify a finding that his counsel was ineffective. "[N]umerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief." United States v. Robinson, 301 F.3d 923, 926 n.3 (8th Cir. 2002) (citing Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir.)(rejecting argument that cumulative effect of errors alone demonstrates deprivation of fair trial), cert denied, 519 U.S. 968 (1996))).

Although defendant believes that the Eighth Circuit Court of Appeals is wrong to not recognize the rule of cumulative error as it relates to ineffective assistance of counsel, it is an issue Crank will have to raise on appeal rather than with this court. This claim is dismissed.

RULING AND ORDER

For the foregoing reasons, defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is denied and dismissed.

IT IS SO ORDERED.

Dated this 12th day of May, 2004.

/s/ Charles R. Wolle

CHARLES R. WOLLE, JUDGE

United States District Court

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, v. ERNEST CARL CRANK, Defendant.	NO. 98-175 ORDER

The Court has before it defendant's application for certificate of appealability filed after the Court denied his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. District Courts have the authority to issue certificates of appealability under 28 U.S.C. § 2255(c) and Fed. R. App. P. 22(b).

The court **grants** defendant's application for certificate of appealability on the first four issues set out in the application; ineffectiveness of trial counsel and sentencing counsel for several reasons there set forth. The court **denies** the application as to the fifth and sixth issues: an Apprendi argument and alleged cumulative errors creating ineffectiveness, notwithstanding that

several circuit courts of appeal allow for cumulative error as a basis for section 2255 relief.

IT IS SO ORDERED.

Dated this 9th day of July, 2004.

/S/ Charles R. Wolle

CHARLES R. WOLLE, JUDGE

United States District Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2467

Ernest Carl Crank,	
Appellant,	Appeal from the United States
vs.	District Court for the Southern
United States of America,	District of Iowa
Appellee.	

Before LOKEN, Chief Judge, FAGG, and BEAM, Circuit Judges

JUDGMENT

Upon consideration of the government's motion to vacate the certificate of appealability, the certificate of appealability is hereby vacated as improvidently granted. Appellant's motion to remand for remand is denied as moot. The appeal is dismissed. (5361-010199)

August 11, 2004

Order Entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Thomas F. Eagleton Court House

Room 24.329 VOICE (314)244-2400

Michael E. Gans 111 S. 10TH Street FAX (314)244-2780

Clerk of Court St. Louis, Missouri 63102 www.ca8.uscourts.gov

December 17, 2004

Mr. James R. Rosenbaum

Clerk

U.S. DISTRICT COURT, SOUTHERN IOWA

P.O. Box 9344

Des Moines, IA 50306-9344

Re: 04-2467 Earnest Carl Crank vs. USA

Dear Clerk:

The mandate of this Court is being sent to the clerk of the district court, together with a receipt. The clerk of the district court is requested to sign, date, and return the receipt to this office.

D-2

Any district court records in this court's possession will be returned shortly.

(5175-010199)

Michael E. Gans

Clerk of Court

Dms

Enclosure

(LETTER FOR INFORMATIONAL PURPOSES ONLY)

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cc: Honorable Charles R. Wolle

Ernest Carl Crank

Clemens A. Erdahl

Clifford R. Cronk III

District Court/Agency Case Number(s): 4:02-cv-80569

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-2467

Ernest Carl Crank,	
Appellant,	Appeal from the United States
vs.	District Court for the Southern
United States of America,	District of Iowa
Appellee.	

The following events transpired during calendar year 2004. On August 11, the court vacated a certificate of appealability issued by the district court on four of six issues raised by Crank and dismissed his appeal. Instead of filing a timely petition for rehearing and rehearing en banc, Crank moved for an extension until November 24 to file his petition, and the motion was granted on September 27. Again, instead of filing a timely petition, Crank moved for another sixty-day extension. This motion was denied on December 10, and having dismissed the appeal on August 11, the mandate issued on December 17. On the same day, Crank filed an application for a certificate of appealability on the two issues the district court rejected when it

issued the certificate of appealability mentioned above. In considering Crank's application, we necessarily construe it to include a request to recall the mandate, and having carefully considered the sequence of events summarized above, we deny Crank's request to recall the mandate and having carefully considered the sequence of events summarized above, we deny Crank's request to recall the mandate and his application for a certificate of appealability.

It is so ordered.

January 31, 2005

Ordered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

AFFIDAVIT OF JACKIE L. HARRIS

STATE OF IOWA)
) ss:
COUNTY OF LINN)

I, Jackie L. Harris, being first duly sworn on oath do depose and state that I am a legal assistant with the firm of Nidey Peterson Erdahl & Tindal, PLC, in Cedar Rapids, Iowa. I further state that on December 17, 2004, I faxed to the Clerk of the 8th Circuit Court of Appeals in St. Louis, Missouri, at 314-244-2780, an eight-page Motion for Certificate of Appealability and a one-page cover sheet in case number 04-2497 at the direction of attorney Clemens A. Erdahl. Upon examination of the fax confirmation information and the telephone bill for the firm's fax line, both of which are attached herewith, I can state with certainty that the fax was sent at 10:56 a.m. CST. While the fax confirmation indicates a transmittal time of one hour later, I believe that the telephone bill is the more accurate document as the firm's fax machine is often not adjusted to reflect changes to and from daylight savings time.

Jackie L. Harris

Subscribed and sworn to before me by the aforesaid Jackie L. Harris on this 29th day of April, 2005.

NOTARY PUBLIC, STATE OF IOWA

NOTARIAL SEAL IOWA

FRANK J. NIDEY
COMMISSION NO. 148752
MY COMMISSION EXPIRES
9/24/06

From:	VIA Transmission - Eighth Circuit U.S. Court of Appeals Clerks Office
To:	Clemens A. Erdahl
Date:	December 17, 2004 12:52 PM
Pages:	2
Subject:	Via Notice for case 04-2467 ~04-2467:dms245926121704P2-4:0

D-1

----------VIA TRANSMISSION----------

TO: Clemens A. Erdahl

FROM: United States Court of Appeals for the Eighth Circuit

Circuit Clerks Office
111 South 10th Street
Suite 24.329
Saint Louis, MO 63102

Voice: 314-244-2400 Fax..: 314-244-2780

TRANSMISSION VERIFICATION REPORT

TIME : 12/17/2004 12:01
NAME :
FAX :
TEL :
SER.# : BROD3N843317

DATE,TIME	12/17 11:58
FAX NO./NAME	13142442780
DURATION	00:02:48
PAGE(S)	09
RESULT	OK
MODE	STANDARD

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Long Distance Detail (Continued)

F-4

NO.	DATE	TIME	CALLED NUMBER	CALLED LOCATION	PRD	TYPE	MIN
Line: 319-369-6972							
329	12/16	4:16 PM	515-284-6281	DES MOINES, IA	F	DD	1.3
330	12/17	9:23 AM	319-668-1706	WILLIAMSBG, IA	F	DD	2.7
331	12/17	10:26 AM	319-668-1706	WILLIAMSBG, IA	F	DD	1.4
332	12/17	10:30 AM	319-668-1706	WILLIAMSBG, IA	F	DD	.7
333	12/17	10:33 AM	319-668-1706	WILLIAMSBG, IA	F	DD	.9
334	12/17	10:56 AM	314-244-2780	ST LOUIS, MO	F	DD	3.0
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